IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
FAMILY COURT APPEAL NO.33 OF 2002

Sudhir Laxman Rajadhyaksha, Aged 50 years, Occ: Service, residing at C-3/13, Nau Sanrakshan Co-operative Housing Society Ltd., Navy Colony, Malad (West), Mumbai-400 064. .... Appellant

- Versus -

Smt. Vishakha S. Rajadhyaksha, Aged 45 years, Occ: Service, residing at A-3, Sai Prasanna Co-operative Housing Society Ltd., Jawahar Nagar, Plot No.354, Road No.19, Goregaon (West), Mumbai-400 062. .... Respondent

Shri P.G. Karande for the Appellant.

Shri Hakeem Salim for the Respondent.

CORAM: R.M.S. KHANDEPARKAR &
ANOOP V. MOHTA, JJ.

DATED: JUNE 15, 2005

ORAL JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Heard. This appeal arises from the judgment and order dated 17-8-2001 passed by the Family Court, Mumbai in M.J. Petition No.1683 of 1997 whereby the petition filed by the appellant-husband for divorce on the ground of desertion by the respondent-wife has been dismissed.

2. The marriage between the appellant and the respondent took place at Mumbai on 14-12-1980 and they had their matrimonial house at Malad (West), Mumbai.

The respondent gave birth to a daughter on 29-11-1981. The life between the parties was going smooth till 1990 and since then the quarrels started. While it is the case of the appellant that undue demands for a luxurious life were the cause for the quarrels, it is the case of the respondent that being dissatisfied on account of the birth of a daughter and not of a male child, that the appellant started neglecting and quarrelling with the respondent. In June, 1995 the respondent received some share in her father's property. On 30-6-1995 the respondent along with her daughter left the matrimonial house and since then has been staying separately. The M.J. Petition No.1683 of 1997 came to be filed by the appellant in September, 1997 which was dismissed by the impugned judgment by the Family Court after hearing the parties.

3. While placing reliance in the decision of the Apex Court in the matter of **Lachman Utamchand Kirpalani v. Meena alias Mota,** reported in AIR 1964 SC 40, the learned Advocate for the appellant submitted that the Family Court erred in dismissing the petition inspite of voluminous evidence brought on record regarding the intention on the part of the respondent not to return back to the matrimonial house and to cohabit with the appellant. According to the learned Advocate for the appellant, the Family Court erred in misconstruing the testimony of the witnesses on record and wrongly assumed

that the conduct of the appellant was of such a nature that it was impossible for the respondent to reside with the appellant along with her daughter. Drawing attention to the finding arrived at by the trial Court to the effect that the appellant was caught red-handed by the respondent encouraging their daughter to see pornographic films, the learned Advocate for the appellant submitted that the finding is not only perverse but is totally contrary to the materials on record. Drawing attention to the correspondence between the parties, the learned Advocate for the appellant submitted that inspite of genuine efforts on the part of the appellant to get the residential address of the respondent, on account of the adamant attitude on the part of the respondent, the same was not made available to the appellant and consequently his efforts to get the respondent back to the matrimonial house proved futile. Being so, according to the learned Advocate, the evidence clearly discloses intention on the part of the respondent right from the day she left the house to desert the appellant and therefore the Family Court ought to have allowed the application for dissolution of the marriage. The learned Advocate for the respondent, on the other hand, submitted that the appellant failed to establish that the respondent left the matrimonial house on 30-6-1995 without sufficient or reasonable cause and that the findings arrived at by the Court below cannot be found fault with because they are

clearly borne out from the records.

4. Upon hearing the learned Advocates for the parties and on perusal of the records, only point which arises for consideration is as to whether the respondent deserted the appellant, without reasonable cause, for a period of more than two years prior to the institution of the petition.

5. Undoubtedly, the Apex Court as well as this Court in number of decisions have laid down that in case of desertion it is necessary to establish the intentional permanent forsaking and abandonment of one spouse by the other, without the consent of the former and without reasonable cause. In other words, it is total repudiation of the obligation of marriage by one of the spouses and consequently total refusal to accept or be associated with the other spouse. In fact, the Apex Court in **Lachman Utamchand Kirpalani's** case (supra), dealing with this print, had clearly ruled thus:-

> "If he or she acts as to make it plain to the deserting spouse that any offer on the part of the latter to resume cohabitation would be rejected, then the deserting spouse could obviously not be blamed for not bringing the desertion to an end. Or again, if before the end of

> the period of two years or the filing of the petition his or her conduct is such as to provide a just cause for the deserting spouse for not resuming cohabitation, the petition cannot succeed, for the petitioner would have to establish that the desertion was without just cause during the entire period referred to in S.10(1)(a) of the Act before he can succeed."

6. If we analyse the evidence on record, undoubtedly, it clearly discloses that the respondent left the residential premises or her matrimonial house on 30-6-1995 along with her daughter and her belongings. The point, however, which requires to be considered is as to whether leaving of the house by the respondent on the said day was without any cause or whether she was compelled to leave the house. Referring to the evidence regarding the agreement for purchase of a flat by the respondent on 27-6-1995 and having obtained share in her father's property in June, 1995 itself, it was sought to be argued on behalf of the appellant that the very fact that the respondent left the premises only after the availability of the share in her father's property and the agreement to purchase a flat independent of her matrimonial house, disclosed her clear intention to leave the matrimonial house and to desert the appellant

permanently on 30-6-1995 itself. It is, however, to be noted that the evidence on record discloses that the agreement for purchase of the flat was preceded by grant of a loan by the employer of the respondent. The first instalment of the loan was granted on 21-6-1995. Undoubtedly, the evidence on record discloses that only a sum of rupees one lakh was received by the respondent in her father's property in the month of June, 1995. Certainly the said amount was not sufficient to purchase a flat. She had, therefore, requested her employer to grant her loan and the same was partially disbursed on 21-6-1995. At the same time, the evidence on record discloses that the employer of the respondent, who was well-known to the appellant, was informed by the appellant that the respondent should leave the matrimonial house on 30-6-1995. There is a categorical statement in that regard by the respondent in her testimony which has gone unchallenged. Simultaneously, the fact that the appellant had informed the employer about the respondent leaving the flat on 30-6-1995 was also confirmed by the said employer in his testimony and the same has also gone unchallenged. It is an admitted fact that the employer of the respondent is well-known to the appellant. This clearly discloses that the appellant had prior knowledge of the fact that the respondent would leave the premises on 30-6-1995. At the same time, there is nothing on record to disclose that the respondent on her own had made any prior

arrangement to leave the house on 30-6-1995. In other words, while the appellant had full knowledge that the respondent had to leave the premises on 30-6-1995, on the part of the respondent there was no indication whatsoever prior to 30-6-1995 that on 30-6-1995 she would leave the matrimonial house. This apparently discloses that there was no intention on the part of the respondent to leave the premises on 30-6-1995 voluntarily or that she wanted to desert the appellant on the said day. On the contrary, it was the appellant who was making all the arrangements to ensure that the respondent should leave the premises on 30-6-1995. This conclusion based on the facts which have come on record is inevitable and supported by the subsequent conduct of the appellant. It is pertinent to note that after the respondent left the premises on 30-6-1995, without ensuring whether the respondent would return back to the premises or not, the appellant hurriedly got the name of the respondent and that of the daughter cancelled from the ration card. After cancellation of the names from the ration card, he wrote a letter to the respondent on 7-9-1995.

7. In the letter dated 7-9-1995 the appellant did not forget to mention that inspite of his efforts the whereabouts of the respondent were not known to him and therefore he sent the letter to the address of the respondent where she was employed. It is a matter of

record that the appellant was well acquainted with the employer of the respondent. He used to visit the office where the respondent was employed. There is nothing on record to disclose that the appellant ever made any attempt to ascertain the address or the residential place of the respondent, either from the employer of the respondent or the other witness who is stated to be a friend of the respondent, namely Suresh Satya Akul. It is also sought to be claimed by the appellant that he tried to get the residential address of the respondent after she had left the premises. However, the materials on record and even the testimony of the appellant nowhere disclose that he ever made any attempt to meet the respondent at the place of her employment even to ascertain her residential address. There is nothing on record to disclose that the appellant even tried to contact his daughter at any point of time. The claim of the appellant that he tried to get the residential address of the respondent is totally unbelievable. Though there are two letters addressed to the respondent - one directly by the appellant to the respondent and another by the Advocate for the appellant to the Advocate for the respondent, in neither of those letters there is a specific enquiry or request to the respondent to disclose her residential address. There is nothing on record to disclose in what manner the appellant tried to ascertain the residential address of the respondent.

It is a mere claim without any substance.

8. The intimation by the appellant to the witness Vasudeo Tolaram Balwani, the employer of the respondent, much prior to 30-6-1995 that the respondent had to leave the premises on 30-6-1995, as claimed by the respondent in her testimony which has not only gone unchallenged, but has been duly corroborated by the statement of the witness Balwani that the appellant had approached the said witness prior to 30-6-1995 informing about the fact that the respondent would leave the premises on 30-6-1995 and the fact that the respondent herself had not made any arrangement to leave the premises on 30-6-1995 and it was at late night on account of compulsion, as claimed by the respondent, that she had to approach Balwani and Suresh to arrange for her belongings to be transported and to make a last moment arrangement for her stay with her brother and to store all her belongings in the garage premises of the witness Suresh. All these facts clearly disclose that the respondent never desired to leave the premises on 30-6-1995 but for the compulsion by the appellant. The evidence on record, therefore, clearly disproves the claim of the appellant that the respondent left the premises on 30-6-1995 with the intention to desert the appellant.

9. There is absolutely no evidence to the effect that the appellant ever tried to contact the respondent and

to ascertain whether she would rejoin the appellant in the matrimonial house. It is sought to be contended that the respondent herself never desired to come back and she never expressed her willingness to join or cohabit with the appellant after she had left the matrimonial house on 30-6-1995.

10. It is also pertinent to note that in the petition the appellant had stated that:-

> "The Petitioner states that till date the Respondent and his daughter SHRADHA has not returned to the matrimonial home and the Petitioner is not aware of whereabouts of the Respondent and daughter except the place of work of the Respondent."

Those averments were replied by the respondent stating that:-

> "The Respondent has made every attempt at returning to her matrimonial home but the Petitioner has refused to permit the Respondent and her daughter to return. The Respondent denies that the Petitioner is not aware of the whereabouts of the Respondent and her

daughter."

These pleadings themselves apparently disclose that apart from stating that the respondent left with her daughter on 30-6-1995 there were no efforts made by the appellant to get the respondent and the daughter back to the matrimonial house. On the contrary, there was a categorical statement about the efforts on the part of the respondent in that regard. Even in the testimony of the appellant there is not a whisper about any effort on the part of the appellant to get the respondent back to her matrimonial house. On the contrary, the respondent has clearly narrated various instances regarding the conduct of the appellant subsequent to delivery of the female child and the insistence of the appellant for a male child. She has also stated that she was forced to terminate her pregnancy twice - once in the year 1983-84 and then in the year 1987. At the same time, she was also compelled to get copper-T fixed which developed certain health problems to her. She has also stated in her testimony that the appellant used to quarrel with the respondent while insisting for having a male child and the same has not been denied by the appellant in the cross-examination. What is curious to note is that in the cross-examination of the respondent she was clearly suggested on behalf of the appellant that it was the appellant who had driven her away out of the matrimonial house and she has confirmed the same. While in the

testimony of the appellant he claims the respondent to have left the premises of her own, the suggestion to the respondent herself while she was in the witness box was totally contrary and to the effect that she was driven away from the house by the appellant himself.

11. The testimonies of Balwani, the employer of the respondent and Suresh, a family friend, clearly lend support to the testimony of the respondent to the effect that she had left the premises on 30-6-1995 not of her own and willingly, but the appellant himself had created a situation which compelled her to leave the premises in the late night of 30-6-1995 and for that purpose she had to take the help of her employer and the family friend Suresh and there being no place to store her goods, she had to store those goods in the garage of Suresh while finding temporary shelter at her brother's place.

12. The evidence on record, therefore, nowhere discloses abandonment of the matrimonial house by the respondent either on 30-6-1995 or any time thereafter and on the contrary discloses that the circumstances which were created by the appellant on 30-6-1995 which left no alternative to the respondent than to leave the said premises. Even thereafter, as stated by the respondent, inspite of her desire to come back and reside with the appellant, she was not allowed to do so on account of refusal on the part of the appellant to

take her back in the house. The appellant in these circumstances cannot be heard to claim that the respondent was staying away from the appellant.

13. For the reasons stated above, therefore, we do not find any illegality having been committed by the Family Court in dismissing the petition for divorce filed by the appellant. The findings arrived at on the point of failure on the part of the appellant to prove the desertion by the respondent cannot be found fault with and the same are clearly borne out of the records. The appellant having not discharged the burden in establishing the claim of desertion by the respondent, he is not entitled for dissolution of the marriage under Section 13(1)(ib) of the Hindu Marriage Act, 1955. Hence, the appeal fails and is hereby dismissed. The appellant to pay the costs of Rs.2,000/- to the respondent.

(R.M.S. Khandeparkar, J.)

(Anoop V. Mohta, J.)